CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

HOOD RUBBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1929
CERTIORARI GRANTED OCTOBER 28, 1929

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court, District of Massachusetts

[Caption omitted.]

No. 3229, Law Docket.

HOOD RUBBER COMPANY, PLAINTIFF

v.

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ of attachment

Filed Jan. 18, 1928

[SEAL.] MASSACHUSETTS DISTRICT, *ss*:

The President of the United States of America to the Marshal of Our District of Massachusetts, or His Deputy, Greeting:

We command you to attach the goods or estate of Thomas W. White, as he is collector of internal revenue for the district of Massachusetts, of Boston, in our District of Massachusetts,
2 defendant to the value of seventy-five thousand ($75,000) dollars, and summon the said Thomas W. White (if he may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the 3rd Tuesday of March, 1928; then and there, in our said court to answer unto Hood Rubber Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and having its usual place of business in Watertown, in said Commonwealth, plaintiff.

In an action of contract or tort.

To the damage of the said plaintiff (as it says) the sum of seventy-five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ with your doings therein.

Witness the honorable James M. Morton, jr., at Boston, the twelfth day of January, in the year of our Lord one thousand nine hundred and twenty-eight.

JOHN E. GILMAN, Jr.,
Deputy Clerk.

Officer's return on writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *January 12, 1928.*

Pursuant hereunto I have this day attached a chip as the property of the within-named defendant, Thomas W. White, and thereafter

on the same day I summoned the within-named defendant, Thomas W. White, to appear at court and answer as herein directed by giving to him in hand at Boston, in said district, an original summons to this writ.

WILLIAM J. KEVILLE,
U. S. Marshal,
By RALPH D. SAWIN, *Deputy.*

Travel .06
Service 2.00

2.06

3 In United States District Court

Declaration

Filed January 18, 1928

The plaintiff says:

1. That it is a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Watertown, in the county of Middlesex and said Commonwealth.

2. That the defendant, Thomas W. White, on the fifteenth day of December, 1926, being the date of the wrongful and illegal acts herein complained of, was and still is the collector of internal revenue for the district of Massachusetts.

3. That on the fourteenth day of March, 1919, the plaintiff filed with the then collector of internal revenue for the district of Massachusetts its income and excess-profits tax return for the calendar year 1918, upon the form prescribed and furnished by the Commissioner of Internal Revenue; that said return contains the following:

"Form 1031 T—Tentative return and estimate of corporation income and profits taxes and request for time for filing return."

A copy of said return is hereto annexed, marked "A," and made a part of this declaration.

4. That said return as filed showed that the plaintiff estimated the taxes due to amount to three hundred thousand dollars ($300,000), and at the time said return was filed a payment of seventy-five thousand dollars ($75,000) was made, being one-quarter of the estimated amount of said tax and being the first installment required to be paid at the time of the filing of said return under the provisions of the revenue act of 1918, then in force and effect.

5. That on said return, above referred to and annexed hereto
4 as A, appears under the heading "Collector's approval" the statement that "the time for filing the completed return of the taxpayer" was extended to April 29, 1919, which time for filing said completed return was thereafter again extended to July 14, 1919, and that said approval was duly executed by the then collector of internal revenue for the district of Massachusetts.

6. That between said March 14, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of the second instalment of the taxes shown to be due by the return herein referred to and marked "A" and amounting to seventy-five thousand dollars ($75,000), and on June 16, 1919, the plaintiff, in consequence of this demand, paid to said collector a second sum of seventy-five thousand dollars ($75,000).

7. That on July 14, 1919, the plaintiff filed a completed income and excess-profits tax return, from which it appeared that the total tax due from the plaintiff for the calendar year 1919 was one hundred sixty-nine thousand seven hundred seventy-two dollars and sixty-five cents ($169,772.65), of which amount one hundred fifty thousand dollars ($150,000) had been paid on March 14, 1919, and June 16, 1919, as above set forth, leaving a balance due of nineteen thousand seven hundred seventy-two dollars and sixty-five cents ($19,772.65), which amount was paid in full on December 12, 1919.

8. That on January 26, 1924, the plaintiff and the Commissioner of Internal Revenue, acting for the United States, entered into an agreement entitled "Income and profits tax waiver," a copy of which is hereto annexed, marked "B," and made a part of this declaration, said waiver being executed and filed in accordance with the provisions of section 250 (d) of the revenue act of 1921; that said waiver stipulated that the parties thereto consented "to a determination, assessment and collection of the amount of income * * * taxes due under any return made by or on behalf of said companies (meaning the plaintiff and its subsidiaries) for the year 1918 under the revenue act of 1921 or under prior * * * tax acts * * * for a period of one year after the expiration of the statutory period of limitations."

9. That thereafter it was determined by the Commissioner of Internal Revenue that there was due from the plaintiff additional taxes for the calendar year 1918 amounting to two hundred forty-nine thousand one hundred thirty-one dollars and ninety-six cents ($249,131.96), and the plaintiff was notified of said determination on February 16, 1924. As a result of information furnished by the plaintiff this amount was reduced to one hundred ninety-one thousand nine hundred seventy-eight dollars and ninety-eight cents ($191,978.98), which amount was on March 18, 1925, assessed to the plaintiff as additional income and excess-profits taxes for the calendar year 1918.

10. That the plaintiff thereupon filed a request for an abatement of the amount so assessed, alleging the same to have been illegally and erroneously assessed, and furnished information to substantiate its allegation; that said request for abatement being considered, it was thereupon determined that there was due from the plaintiff for said additional taxes and interest the sum of forty-nine thousand four hundred five dollars and thirty-four cents ($49,405.34); that a credit of ten thousand three hundred sixty-one dollars and thirty-five cents ($10,361.35) having previously been allowed the plaintiff

as an over-assessment of its taxes for the year 1919, said amount was deducted from said sum of forty-nine thousand four hundred five dollars and thirty-four cents ($49,405.34), leaving as the balance alleged to be due from the plaintiff the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99).

11. That the plaintiff refused to pay said amount for
6 the reasons set forth in its claim for refund hereinafter referred to and that thereupon a warrant of distraint issued for the collection of said amount; that acting under the direction of the defendant herein and under color of said warrant of distraint, on December 15, 1926, a deputy marshal of the United States levied on and seized money of the plaintiff to the amount of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), then being in the Union Market National Bank in Watertown aforesaid and thereupon paid said money over to the defendant, returning said warrant of distraint as satisfied in full.

12. That the plaintiff upon receipt of notice that its property had been so levied on and seized, as above set forth, on December 15, 1926, filed with the defendant a formal protest and demand for the return of said property, all as set forth in its letter of December 15, 1926, a copy of which is hereto annexed, marked "C," and made a part of this declaration.

13. That the defendant, having refused to return said property as demanded, the plaintiff on or about January 15, 1927, filed with the defendant as collector of internal revenue for the district of Massachusetts a claim for refund of the amount of said additional taxes and interest of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), alleging the same to have been illegally collected and illegally assessed, said claim being based on the following contentions:

(1) That the proceeding for the collection of said additional taxes was begun and the collection of said taxes was made after five (5) years from the date when the return for the year 1918 was filed and after the time fixed by the waiver hereinbefore referred to, and that said alleged additional taxes did not on December 15, 1926 (the date on which plaintiff's property was seized), constitute a tax due
7 from the plaintiff, because the collection thereof was barred by the provisions of the revenue act of 1921, section 250 (d), providing as follows:

"The amount of income, excess profits of war profits taxes due * * * under prior income, excess profits or war profits tax acts * * * shall be determined and assessed within five years after the return was filed, unless the commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under * * * prior income, excess profits or war profits

tax acts * * * shall be begun after the expiration of five years after the date when the return was filed * * *."

(2) That the return filed by the plaintiff on March 14, 1919, and treated by the taxing authorities as the basis for the collection of taxes amounting to one hundred fifty thousand dollars ($150,000) is "the return" required by the revenue act of 1918, and sets the statute of limitations running; that said return having been filed as of March 15, 1919, an assessment within the limitation period should have been made before March 15, 1924, which period was extended by the waiver to March 15, 1925; that said tax was assessed on March 18, 1925, three (3) days after the limitation period had expired.

A copy of said claim for refund is hereto annexed, marked "D," and made a part of this declaration.

14. That on November 3, 1927, the Commissioner of Internal [sic] in his official capacity rejected said claim for refund, as appears in the letter from the commissioner, a copy of which is hereto annexed, marked "E," and made a part of this declaration.

8 15. That because of the facts herein set forth said additional taxes and interest of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99) were illegally assessed and illegally collected and were not due from the plaintiff when its property was illegally levied on and seized by the defendant.

Wherefore the plaintiff prays judgment against the defendant for the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), together with interest from December 15, 1926, and for costs.

HOOD RUBBER COMPANY, *Plaintiff.*
By FREDERIC C. HOOD, *President.*

HAROLD C. HASKELL,
Attorney for Plaintiff.

[*Duly sworn to by Frederic C. Hood; jurat omitted in printing.*]

Exhibit A to declaration

404831. Duplicate (to be sent to collector with original).
Form 1031–T—United States Internal Revenue Service.

TENTATIVE RETURN AND ESTIMATE OF CORPORATION INCOME AND PROFITS TAXES AND REQUEST FOR EXTENSION OF TIME FOR FILING RETURN

9 Hood Rubber Co. and subsidiaries, as per list on back of report, Watertown, Massachusetts.

3rd Mass. field dept., Mar. 14, 1919, coll'r. int. rev.

This form, duly approved by the collector, must accompany the taxpayer's completed return when filed.

Penalties:

For making false or fraudulent returns, not exceeding $10,000 or not exceeding one year's imprisonment, or both, in the discretion of the court, and, in addition, 50 per cent of the tax evaded.

For failing to make return on time, not more than $1,000, and, in addition, 25 per cent of the amount of tax due.

Date MARCH 11, 1919. No.——

(To be entered by taxpayer.) (To be entered by collector.)

COLLECTOR OF INTERNAL REVENUE,

Boston, Mass.

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.

An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

No forms or regulations as yet received, so unable to complete figures.

NOTE.—A parent company may make a tentative return and pay the first installment of the tax on behalf of all its subsidiaries without apportioning the tax among them until the completed return is filed.

Estimated amount of tax	00
Amount of remittance herewith	$300,000.100

[Across the face of this form is written:] "Paid under protest."

Check or draft	Money order	Currency or coin	Certificate of indebtedness	Total
$75,000.—	$————	$————	$————	$75,000.—

Collector's approval

In consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, and for the reasons stated above, the time for filing the completed return of the taxpayer whose name and address appear at the head of this form is hereby extended, by authority of the Commissioner of Internal Revenue, until April 29, 1919.

If the remittance accompanying this tentative return exceeds one-fourth of the tax as computed on the completed return, the excess will be credited against the balance remaining to be paid. If the remittance is less than one-fourth of the tax, the balance due, with interest at the rate of six per cent per annum from March 15, 1919,

must accompany the completed return. If the amount paid exceeds the total tax as shown by the completed return, the excess will be refunded.

Date, March 25, 1919.

(Signed) JOHN F. MALLEY,
Collector of Internal Revenue,
3rd District of Massachusetts.

Hood Rubber Company subsidiaries

Arrow Rubber Company, Boston, Mass., #1504376.
Capital City Rubber Company, Columbus, Ohio.
Dearborn Rubber Company, Chicago, Ill.
East Watertown Realty Company, Watertown, Mass.,
11 #1751020.
Grand Rapids Shoe & Rubber Company, Grand Rapids, Mich.
Hood Tire Co., Inc., Watertown, Mass., #1751054.
Iowa Rubber Shoe Company, Davenport, Iowa.
Massachusetts Rubber Company, Watertown, Mass., #1504378.
Old Colony Rubber Company, Watertown, Mass., #1504375.
Pilgrim Rubber Footwear Co., Boston, Mass., #1504379.
Shawmut Rubber Co., Watertown, Mass., #1504377.
Shawmut Tire Co. of New York, Inc., New York, N. Y.
Midwest Rubber Shoe Co., Omaha, Nebr.

Exhibit B to declaration

IT:CR:E. JHLT. JANUARY 26, 1924.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period or limitation, or the statutory period of limitation as extended
12 by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned.

HOOD RUBBER COMPANY, *Taxpayer.*
By FREDERIC C. HOOD, *President.*
D. H. BLAIR, *Commissioner.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Exhibit C to declaration

DECEMBER 15, 1926.

THOMAS W. WHITE, Esq.,
Collector of United States Internal Revenue,
Park Square Building, Boston, Massachusetts.

DEAR SIR: We are informed by the Union Market National Bank of Watertown that Mr. John Christoforo, division chief deputy from your office, has this day made demand upon and received from said bank the sum of $39,043.99, alleging that the same was due as an additional income tax imposed on the Hood Rubber Company for the year 1918, together with interest thereon.

Please be advised that the Hood Rubber Company protests against this action and states that the alleged sum was not due from it to the United States of America, and has therefore been illegally seized and taken by Mr. Christoforo.

Demand is hereby made for the return of said sum, to wit, $39,043.99, forthwith.

Very truly yours,

HOOD RUBBER COMPANY.
HAROLD C. HASKELL.

HCH:GEG.

13 *Exhibit D to Declaration*

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

Treasury Department.
Internal Revenue Service.
Form 843—Jan., 1922.
Comptroller General U. S.
January 18, 1922.

Important

File with the collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Collector's notation

District:

Account number:

Date received
(stamp here):

Collector of Internal Revenue.

STATE OF MASSACHUSETTS,
County of Middlesex, ss:

Hood Rubber Company (name of taxpayer).

98 Nichols Avenue, Watertown, Massachusetts (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

14 1. Business in which engaged: Manufacture of rubber goods. Period from Jan. 1, 1918, to Dec. 31, 1918.

2. Character of assessment or tax: Income and profits. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: $39,043.99.

4. Reduction of tax liability requested (income and profits tax): ———.

5. Amount to be abated: ———.

6. Amount to be refunded (or such greater amount as is legally refundable): $39,043.99.

7. Dates of payment (see collector's receipts or indorsements of canceled checks): December 15, 1926. (If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed: Massachusetts.

9. District in which unpaid assessment appears: ———.

10. Amount of overpayment claimed as credit: ———.

11. Unpaid assessment against which credit is asked: Period from ——— to ———.

Deponent verily believes that this application should be allowed for the following reasons:

See statement hereto annexed and marked "A."

(Signed) HOOD RUBBER COMPANY,
By (Sgd.) DONALD T. HOOD,
Treasurer.

Sworn to and subscribed before me this tenth day of January, 1927.

——— ———, *Notary Public.*

(Filed January 18, 1928.)

15 *Exhibit D*—Continued

A

The Hood Rubber Company filed its income and consolidated excess-profits tax return for the calendar year 1918 on the 14th day of March, 1919.

This return is on a printed form furnished by the Treasury Department and is headed as follows: "Form 1031–T—Tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return."

The blank contains a request for an extension of time for forty-five (45) days and gives the following reason for asking this extension: "No forms or regulations as yet received, so unable to complete figures."

The return contained an estimated tax due of $300,000, and with it a check for $75,000 was enclosed. Later a further extension of time was granted and the company was permitted to file a completed return on or before July 14, 1919.

In the meantime a bill was received from the collector for the payment of the second installment, based on the tentative return and estimate filed, and a second check for $75,000 was sent to the collector on June 16, 1919.

A completed return was filed on July 14, 1919, showing a total tax due of $169,772.65 on the basis of this return, and final payment was made December 12, 1919, of $19,772.65.

On January 26, 1924, a waiver was signed and filed, which stipulated that the company consented "to a determination, assessment, and collection of the amount of income, etc., taxes due under any return made by or on behalf of said companies for the year 1918, under the revenue act of 1921 or under * * * prior act * * *."

On February 16, 1924, a letter was received showing an additional tax of $249,131.96, which amount was later reduced to $191,-
16 978.98, and this amount was assessed to the Hood Rubber Company on March 18, 1925, as an additional tax.

Later correspondence and conferences with the department resulted in credits being issued which finally reduced the amount assessed to $39,043.99. The Hood Rubber Company having refused to pay this tax, a warrant of distraint issued, and on December 15, 1926, a deputy marshal of the United States levied on and seized money of the Hood Rubber Company in the Union Market National Bank of Watertown, Massachusetts, said levy being for the amount of said tax and interest, a total of $39,043.99.

Immediately upon notice that this had been done the Hood Rubber Company filed a protest with the Commissioner of Internal Revenue at Boston, Massachusetts, and demanded the return of the money so seized.

Although the assessment was apparently made in March of 1925, according to the terms of the waiver filed on January 26, 1924, any "determination, assessment, and collection" would have to be made under the provisions of the revenue act of 1921. The return having been filed in 1919, the assessment would have to be made in 1924, except for the waiver, and the taxpayer in filing a waiver only consented to be assessed under the provisions of the revenue act of 1921.

From the foregoing facts it seems clear that the alleged additional tax taken on distraint by the Government was:

(1) Illegally collected.
(2) Illegally assessed.

1. Section 250 (d) of the revenue act of 1921 provides: "No suit or proceeding for the collection of any such taxes, due under this act or any prior income, etc., acts, shall be begun after the expiration of five (5) years from the date when such return was filed."

The time for collection as well as for assessment would have expired on March 15, 1924, had it not been for the waiver, which extended the time for collection by its terms to March
17 15, 1925. The waiver, by its very language, consents to a "determination, assessment, and collection" of the tax within a period of one year after the statute of limitations would otherwise expire.

A number of court decisions seem to have definitely settled the point that both the assessment and collection must be made within the period fixed by the statute, and that any collection after the expiration of the limitation period is illegal. The case of Bashara vs. Hopkins (290 Fed. 592) is typical and the language of the court at page 595 states the matter very clearly.

"* * * A collection of a tax made beyond the period allowed by law would be illegal and such a collection would stand exactly upon the same basis as a collection made under an unconstitutional statute."

Another similar case is that of Seaman vs. Bowers (297 Fed. 371), in which the court at page 374 uses the following language:

"It was clearly the legislative intent to set up the statutory limitation against the collection of the tax, whether by administrative action or by suit at law."

To the same effect is the case of New York and Albany Lighterage Company vs. Bowers (10 Fed. (2d) 1017) decided by the Circuit Court of Appeals of the Second Circuit. This case was taken to the United States Supreme Court on a writ of certiorari and argued on January 5, 1927. At the conclusion of the argument presented by counsel for the Government (the petitioner) the court excused the taxpayer from the presentation of any argument, which would seem to indicate that it will sustain the finding of the lower court.

The taxpayer's position is stronger than that in any of the cited cases, because by the terms of the waiver itself it expressly
18 stipulated that the collection must be made within one year after the period of limitations expired. The very latest date on which the Government could proceed to collect the tax, either by court proceedings or by warrant of distraint, was March 15, 1925. The tax having been collected on December 15, 1926, said collection is wholly illegal and void.

2. Section 239 (a) of the revenue act of 1921 provides "that every corporation subject to taxation under this title * * * shall make a return showing specifically the items of gross income, etc."

By section 227 of the same act "if the return is made on the basis of the calendar year, then the return shall be made on or before the

15th day of March," and later in the same section, "The commissioner may grant a reasonable extension of time for filing returns, whenever in his judgment good cause exists, etc."

The regulations of the Treasury Department provide that "returns made under this act * * * must be made on the forms prescribed by this department for each particular year."

If it be contended that the return made by the Hood Rubber Company on March 14, 1919, is not "the return" contemplated by the statute, it is suggested that it conforms in all respects with the sections of the statute and the regulations above stipulated.

It was made on the basis of the calendar year and filed on or before the 15th day of March. It was made on a form prescribed by the Treasury Department and was accompanied by a check in payment for the first installment of the amount of tax which it showed was due. The Treasury Department recognized it as a return by sending a bill for the second installment on the basis of this very document.

Congress has given the Commissioner of Internal Revenue authority to do one of two things—either receive a return accompanied by a check for a proper amount of payment of tax which may be due, or to extend the time for filing a return. Of course if the commissioner extends the time for filing the return the corporation is excused from filing such return until the period granted has expired, and if such time is granted no payment of tax will be due until the return is filed.

19

More than this, the document itself is called "a tentative return" and distinguishes between a tentative return and a completed return; it is obvious that only what has been begun can be completed, all of which shows clearly that the document filed by the taxpayer in 1918 was "the return" contemplated by the revenue act.

This return having been filed as of March 15, 1919, an assessment should have been made before March 15, 1924, which period of time, however, was extended by the waiver to March 15, 1925. The tax was actually assessed by the Treasury Department on March 18, 1925, which was three (3) days after the statute of limitations had run against such assessment. No assessment could legally have been made subsequent to March 15, 1925, and the assessment as made is wholly illegal and void.

The sum of $39,043.99 having been both illegally assessed and illegally collected, it is respectfully requested that the said amount be refunded, together with interest thereon from December 15, 1926.

HOOD RUBBER COMPANY,
By (Signed) DONALD T. HOOD, *Treasurer*.

20 *Exhibit E to declaration*

Address reply to Commissioner of Internal Revenue and refer to IT:CR:D, CT.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, November 3, 1927.

HOOD RUBBER COMPANY,
98 Nichols Avenue, Watertown, Massachusetts.

SIRS: Your claim for the refund of $39,043.99, income and profits tax for the year 1918, has been examined.

The claim is based on the statements that the tax was illegally assessed and illegally collected.

In accordance with Solicitor's Memorandum 1404, published in Cumulative Bulletin 111–1, the bureau holds "the five-year period of limitation upon assessments of income and profits taxes, provided in section 250 (d) of the revenue act of 1921, begins to run from the date of the filing of the complete return, and not from the date the tentative return was filed." Your complete return was filed July 14, 1919, and the period within which tax could be assessed under the revenue acts of 1918 and 1921 would therefore extend to July 14, 1924, and the waiver extending the period for one year would expire July 14, 1925. The assessment made in March, 1925, was therefore made before the expiration of the waiver.

Section 278 (d) of the revenue acts of 1924 and 1926 provides that where assessment of the tax is made within the period prescribed in sections 277 or 278 of those acts such tax may be collected by distraint begun within six years after the assessment of the tax.

21 Since the tax was assessed within the statutory period applicable thereto, as extended by waiver, and the collection of such tax was made within the period of limitation provided in the revenue acts of 1924 and 1926, a refund of the tax based on the contention that such tax was assessed and collected after the expiration of the statutory period properly applicable thereto must be denied.

Your claim will therefore be rejected.

The notice of this rejection will officially appear on the next schedule to be approved by the commissioner.

Copy of this letter has been mailed to Mr. F. S. Bright in accordance with your authorization contained in your power of attorney running to him, which is on file in this office.

Respectfully,

C. B. ALLEN,
Deputy Commissioner.
By (Sgd.) H. B. ROBINSON,
Head of Division.

Upon the filing of the writ and declaration herein, an order to plead was entered.

In United States District Court

Answer

Filed February 17, 1928

Now comes the defendant in the above-entitled action and for his answer denies each and every material allegation, item, count, and particular in the declaration contained.

By his attorneys:

FREDERICK H. TARR,
United States Attorney,
By J. M. LEINENKUGEL,
Special Assistant to the U. S. Attorney.

22 In United States District Court

Waiver of jury trial

Filed June 21, 1928

It is hereby agreed by and between the parties to the above-entitled action that a trial by jury therein be waived.

HAROLD C. HASKELL,
Attorney for Plaintiff.
FREDERICK H. TARR,
United States Attorney, Attorney for Defendant,
By J. M. LEINENKUGEL,
Special Asst. to the U. S. Atty.

In United States District Court

Agreed statement of facts

Filed July 26, 1928

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiff is a Massachusetts corporation with its usual place of business in Watertown, Massachusetts; that the defendant was on December 15, 1926, and still is collector of internal revenue for the district of Massachusetts.

2. That on March 14, 1919, the plaintiff filed with the then collector of internal revenue, for the calendar year 1918, Form 1031–T,
23 entitled "Tentative return and estimate of corporation income and profits taxes and request for extension of time for filing

return"; that a copy of said Form 1031–T, annexed to plaintiff's declaration and marked "A," is a true and correct copy of said Form 1031–T and is hereby referred to and made a part of this agreement; that said Form 1031–T was furnished by the Treasury Department; that the estimated amount of tax for the calendar year 1918 shown on said Form 1031–T was three hundred thousand dollars ($300,000.00); that the plaintiff paid at the time said Form 1031–T was filed the sum of seventy-five thousand dollars ($75,000).

3. That the time for filing a completed return was first extended to April 29, 1919, and again to July 14, 1919; that at sometime between March 14, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of seventy-five thousand dollars ($75,000), the same being the second instalment of taxes shown to be due by the return made March 14, 1919, and herein referred to as Exhibit A, and on June 16, 1919, the plaintiff paid said sum of seventy-five thousand dollars ($75,000) in consequence of said demand. A copy of said demand is hereto annexed and made a part of this agreement.

4. That on July 14, 1919, the plaintiff filed for the calendar year 1918 Form 1120, entitled "Corporation income and profits tax return," disclosing a total tax due from the plaintiff for the calendar year 1918 in the amount of one hundred sixty-nine thousand seven hundred seventy-two dollars and sixty-five cents ($169,772.65), of which amount one hundred fifty thousand dollars ($150,000) having been paid, the balance, amounting to nineteen thousand seven hundred seventy-two dollars and sixty-five cents ($19,772.65), was duly paid on December 15, 1919. A copy of the same is hereto attached.

5. That on January 26, 1924, the plaintiff and the Com-
24 missioner of Internal Revenue entered into an agreement entitled "Income and profits tax waiver"; that the copy of said waiver annexed to plaintiff's declaration and marked "B" is a true and correct copy of the same and is hereby referred to and made a part of this agreement.

6. That thereafter the Commissioner of Internal Revenue determined that additional taxes were due from the plaintiff for the calendar year 1918, amounting to two hundred forty-nine thousand one hundred thirty-one dollars and ninety-six cents ($249,131.96), and that the plaintiff was duly notified of said determination on February 16, 1924; that this amount was afterward reduced to one hundred ninety-one thousand nine hundred seventy-eight dollars and ninety-eight cents ($191,978.98), which amount was on March 18, 1925, assessed to the plaintiff as an additional income and excess-profits tax for the calendar year 1918.

7. That thereafter and on July 6, 1926, the Commissioner of Internal Revenue notified the plaintiff that it had been overassessed for the calendar year 1918 the amount of one hundred forty-nine thousand twenty-six dollars and sixty-five cents ($149,026.65), which, deducted from the one hundred ninety-one thousand nine hundred

seventy-eight dollars and ninety-eight cents ($191,978.98), left a net assessment of forty-two thousand, nine hundred fifty-two dollars and thirty-three cents ($42,952.33); that a credit of ten thousand three hundred sixty-one dollars and thirty-five cents ($10,361.35) having previously been allowed to the plaintiff as an over-assessment for the year 1919, said amount was deducted from said forty-two thousand nine hundred fifty-two dollars and thirty-three cents ($42,952.33), leaving a balance alleged to be due of thirty-two thousand five hundred ninety dollars and ninety-eight cents ($32,590.98), which amount plus six thousand four hundred fifty-three dollars and one cent ($6,453.01) interest made a total amount alleged to be due from the plaintiff of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99).

8. That thereafter a warrant for distraint issued for the collection of said amount and that acting under said warrant, on December 15, 1926, a deputy marshal of the United States levied upon and seized money of the plaintiff to the amount of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), then being in the Union Market National Bank of Watertown, Massachusetts, and paid said sum to the defendant herein, returning the warrant of distraint as satisfied in full.

9. That on December 15, 1926, the plaintiff forwarded to the defendant a formal protest and demand for return of the money so seized; that the copy of said letter of protest annexed to plaintiff's declaration and marked "C" is a true and correct copy thereof and is hereby referred to and made a part of this agreement.

10. That on January 10, 1927, the plaintiff filed with the defendant a claim for refund of said amount to thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99); that the copy of said claim for refund annexed to plaintiff's declaration and marked "D" is a true and correct copy thereof, and is hereby referred to and made a part of this agreement.

11. That on November 3, 1927, the Commissioner of Internal Revenue rejected said claim for refund, as appears in a letter from the commissioner, a copy of which is annexed to plaintiff's declaration and marked "E"; that said copy is a true and correct copy thereof and is hereby referred to and made a part of this agreement.

12. That if the plaintiff is entitled to recover in this action the amount for which judgment should be rendered is the said sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), together with interest thereon from December 15, 1926.

HAROLD C. HASKELL,
Attorney for Plaintiff.
FREDERICK H. TARR,
United States Attorney.
J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorney for Defendant.

Form 1108. United States Internal Revenue.

OR MEMORANDUM FOR TAXPAYER—INCOME AND EXCESS PROFITS TAX FOR 1918

275

3RD DISTRICT, BOSTON, MASS., *June 16, 1918.*

Instructions to taxpayers

Detach this part of the form and retain it as a record of the payment of your tax unless you want a receipt other than the endorsement on your check. If a receipt is desired, forward this part of the form and the notice with your remittance. Otherwise no receipt will be assured.

Second installment, 1918, income tax.

#404831. H.

Hood Rubber Co., Watertown, Mass., $75,000.00.

Taxpayer's record

Check. No ----------	Money order. No----------
Bank----------	Office of issue----------
Date ----------	Date ----------

JOHN F. MALLEY,
Collector of Internal Revenue.

Income tax.	Paid June 17, 1919.
Excess-profits tax.	Cashier, F.
Total.	Boston, Mass.

27 [MEMORANDUM.—By agreement of counsel, copy of corporation income and profits tax return for the calendar year 1918, referred to in the foregoing agreed statement of facts as annexed, is here omitted, the original being detached and transmitted to the U. S. Circuit Court of Appeals with this transcript of record. James S. Allen, clerk.]

In United States District Court

Minute entry of hearing

On the said 26th day of July said cause was set down for hearing and fully heard by the court on the above-mentioned agreed statement of facts, the honorable James A. Lowell, District Judge, sitting.

Said cause was thence taken under advisement and on the 29th day of August, A. D. 1928, an opinion of the court was announced, ordering judgment to be entered for the plaintiff.

This cause was thence continued to the present September term, A. D. 1928, when, to wit, October 8, 1928, a draft bill of exceptions is filed by the defendant.

On the 14th day of November, A. D. 1928, the aforementioned bill of exceptions is allowed by the court.

On the 21st day of November, A. D. 1928, the following motion for entry of judgment forthwith is filed and assented to:

In United States District Court

Motion for entry of judgment forthwith

Filed November 21, 1928

Now comes the plaintiff in the above-entitled cause and moves that judgment for the plaintiff, with costs, be entered forthwith.

By its attorney:

HAROLD C. HASKELL.

Assented to:

FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to United States Attorney.

28 In United States District Court

Judgment

On the 27th day of said November the motion for entry of judgment is allowed by the court.

Thereupon, to wit, November 27, 1928, it is considered by the court, the honorable James A. Lowell, District Judge, sitting, on the finding of the court, that the said Hood Rubber Company, plaintiff, recover of the said Thomas W. White, collector of internal revenue for the district of Massachusetts, defendant, the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99) damages, together with interest amounting to four thousand five hundred and sixty-eight dollars and fifteen cents ($4,568.15), and its costs of suit taxed at $———.

In United States District Court

3228. Law. 3229. Law

HOOD RUBBER CO. v. THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE

Opinion

August 29, 1928

LOWELL, J.: These were two actions to recover income and excess-profits taxes for the year 1918 and 1919, paid under protest. The facts are similar, and it was agreed at the hearing that the determination of one of them would carry with it the decision of the other.

On March 14, 1919, the plaintiff filed an estimated return of profits for the year 1918 in the sum of $300,000, and paid at the same time the first quarterly installment of $75,000. The return was made out on a paper called a "Tentative return and request for extension of time." The time for filing a completed return was twice extended, the last date being July 14, 1919. In the meantime the commissioner had demanded, and the plaintiff had paid, a second quarterly installment of $75,000. The completed return was filed on July 14,
29 1919. On January 26, 1924, the plaintiff and the commissioner came to an agreement, extending the time of assessment and collection of the taxes for one year beyond the statutory period of limitation (five years in all). This instrument was as follows:

"JANUARY 26, 1924.

"Income and profits tax waiver:

"In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts. * * * This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned."

The commissioner assessed the taxes on March 18, 1925, and collected them by restraint on December 15, 1926.

The plaintiff contends that the taxes were illegally assessed and collected, as both the assessment and collection were made after the expiration of the time allowed by the waiver.

Two questions arise:

First—Was the assessment made in time? and

Second—Was the tax collected in time?

The first question depends upon the meaning of the word
30 "return" as used in the statute. The waiver, construed in connection with the statute, allowed five years from the return in which to make the assessment. If the word "return" refers to the tentative return, the Government did not assess the tax in time. If, however, it refers to the completed return, the assessment was made within the required five years. This question, which is not free from doubt, need not be decided, as even if it be granted that the assessment was made in time the tax was not collected within five years from the date of the completed return.

The Government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The Govern-

ment takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the later statute of 1924, which allowed six years after a valid assessment for collection. The Government can not have its cake and eat it too. Either the waiver conferred no power on the Government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the Government to take advantage of one part of the waiver and refuse to be bound by the other part of it. The statement made in the Government's brief and in some of the cases—that the waiver was made by the taxpayer and the commissioner with future statutes in view—seems far-fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.

The Government cites cases to the effect that "no officer of the Government has the right to waive the statute of limitations in favor of the United States." See, for instance, DeArnaud v.
31 United States (151 U. S. 483). These cases are sound law, but they apply only to statutes of limitation then in force, and not to ones which are prescribed by Congress in later acts. In this case the commissioner did not waive a statute of limitation; it was the taxpayer who waived it and gave more time to the commissioner to assess and collect the taxes.

The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended, and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract which can not be varied by subsequent legislation. (C. & N. W. Ry. Co. v. United States, 104 U. S. 680.)

The Government cites certain paragraphs from the opinion of the Board of Tax Appeals in Sunshine Coat and Suit Co., Petitioner, v. Commissioner (10 B. T. A. 971) in support of its contention in the present case. That case was rightly decided, as the collection of the tax was not mentioned in the last two of the three waivers which were there in suit, so that the assessment having been made in time the provisions of the act of 1924, allowing collection to be made within six years of a valid assessment, came into force. The passages in the opinion cited by the Government were not necessary to the decision in the case, and therefore do not carry with them as much weight as if they were not obiter dicta.

Judgment for plaintiff.

In United States District Court

Defendant's bill of exceptions and order settling same

Filed October 8, 1928; allowed November 14, 1928

This is an action at law against Thomas W. White, collector of internal revenue for the district of Massachusetts,
32 to recover income and excess profits taxes for the calendar year 1918 in the amount of $39,043.99 and interest from December 15, 1926. The pleadings are part of this record and may be referred to as part of this bill of exceptions. The case was tried before Lowell, J., without a jury upon an agreed statement of facts. The following are all the material facts in the case.

The plaintiff, a Massachusetts corporation, on March 14, 1919, filed with the then collector of internal revenue for the district of Massachusetts an income and excess profits tax return for the calendar year 1918, designated "Tentative return," on a form prescribed and furnished by the Treasury Department, there being then no other form for making such a return. The plaintiff at the time of filing said return paid the sum of $75,000 on account of taxes due for the calendar year 1918.

The time for filing plaintiff's completed return was extended to April 29, 1919, and again until July 14, 1919. Between April 29, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of $75,000, being the second installment shown to be due by the return made on March 14, 1919, and on June 16, 1919, the plaintiff paid said sum of $75,000 to the then collector of internal revenue.

On July 14, 1919, the plaintiff filed a completed return, disclosing a total tax due from the plaintiff for the calendar year 1918 in the amount of $169,772.65, of which amount $150,000 having been paid the balance of $19,772.65 was paid on December 15, 1919.

On January 26, 1924, the plaintiff and the Commissioner of Internal Revenue entered into an agreement in writing entitled "Income and profits tax waiver," the body of which was in words and figures as follows:

33 "In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts. * * * This waiver is in effect from the date it is assigned by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limita-

tion, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned."

Thereafter, on March 18, 1925, the Commissioner of Internal Revenue assessed an additional income and excess-profits tax against the plaintiff in the amount of $191,978.98. Said amount was subsequently reduced by the commissioner to $49,405.34, and a credit of $10,361.35 having previously been allowed as an overassessment for the year 1919 said amount was deducted from the amount of $49,405.34, leaving a balance of $39,043.99, which was collected by distraint on December 15, 1926.

On January 10, 1927, the plaintiff duly filed with the defendant a claim for refund in the amount of $39,043.99, and on November 3, 1927, said claim was rejected in its entirely by the Commissioner of Internal Revenue.

At the conclusion of the argument the defendant filed a motion for judgment and a request that the court find as matters of law the following:

34 1. That the tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return was not the return of the taxpayer for the calendar year 1918 required by the provisions of section 239 of the revenue act of 1918, and that the statute of limitations as to assessment and collection did not start running from the date said tentative return was filed.

2. That the return required by the provisions of section 239 of the revenue act of 1918 for the calendar year 1918 having been filed by the plaintiff on July 14, 1919, under section 250 (d) of the revenue act of 1921, the commissioner had five years from July 14, 1919, to make an assessment and collection of plaintiff's 1918 tax; that the waiver executed January 26, 1924, gave the commissioner until July 14, 1925, to make such assessment and collection of plaintiff's 1918 tax; that the additional assessment of plaintiff's 1918 tax was made on March 18, 1925, well within the period as extended by the waiver.

3. That in a case where the assessment of a tax is properly made within the period of limitation properly applicable thereto, subsequent to the enactment of the revenue act of 1924, said section 278 (d) of the revenue act of 1924 allows the commissioner six years from the date of said assessment within which to make collection.

The court in an opinion handed down on August 29, 1928, held that even if it be granted that the assessment was made in time the tax was not collected within six years from the date of the completed return, and that the waiver filed by the taxpayer did not extend the period of collection for more than a year after the period for assessment and collection as fixed by the statute; that there was binding contract between the taxpayer and the Government which could not

be varied by subsequent legislation; that judgment should be entered for the plaintiff.

The defendant being aggrieved by the ruling of the court, as hereinbefore set forth, and its refusal to grant defendant's motion for judgment and his request for findings of law, now excepts to said rulings and brings this bill of exceptions and prays that it may be allowed.

By his attorneys:

FREDERICK H. TARR,
United States Attorney.
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

The foregoing bill of exceptions may be allowed.

HAROLD C. HASKELL,
Attorney for petitioner.

The foregoing bill of exceptions is allowed this 14 day of November, 1928.

JAMES A. LOWELL, *D. J.*

In United States District Court

Defendant's petition for appeal

Filed January 24, 1929

Now comes the defendant, Thomas W. White, collector of internal revenue for the first district of Massachusetts; conceiving himself aggrieved by the finding and ruling of the court, and the judgment entered in pursuance thereof on the twenty-seventh day of November, 1928, in the above-entitled cause, does hereby appeal from the said finding, ruling, and judgment to the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

By his attorneys:

FREDERICK H. TARR,
United States Attorney.
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

Petition for appeal allowed.

JAMES A. LOWELL,
United States District Judge.

36 In United States District Court

Defendant's assignment of errors

Filed January 24, 1929

The defendant in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon trial of the case, to wit:

I. The court erred in refusing to grant the request of the defendant for rulings of law as follows:

"1. That the tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return was not the return of the taxpayer for the calendar year 1918 required by the provisions of section 239 of the revenue act of 1918, and that the statute of limitations as to assessment and collection did not start running from the date said tentative return was filed.

"2. That the return required by the provisions of section 239 of the revenue act of 1918 for the calendar year 1918 having been filed by the plaintiff on July 14, 1919, under section 250 (d) of the revenue act of 1921, the commissioner had five years from July 14, 1919, to make an assessment and collection of plaintiff's 1918 tax; that the waiver executed January 26, 1924, gave the commissioner until July 14, 1925, to make such assessment and collection of plaintiff's 1918 tax; that the additional assessment of plaintiff's 1918 tax was made on March 18, 1925, well within the period as extended by the waiver.

"3. That in a case where the assessment of a tax is properly made within the period of limitation properly applicable thereto, subsequent to the enactment of the revenue act of 1924, said section 278 (d) of the revenue act of 1924 allows the commissioner six years from the date of said assessment within which to make collection."

37 II. The court erred in ruling that the plaintiff was entitled to recover.

Wherefore the petitioner prays that the judgment of the District Court may be reversed.

By his attorneys:

FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

[Citation in usual form, showing service on Charles C. Gammons, omitted in printing.]

38 [Clerk's certificate to foregoing transcript omitted in printing.]

[MEMORANDUM.—An order of enlargement of time for docketing case to and including March 25, 1929, is here omitted. A. I. Charron, clerk.]

39 In United States Circuit Court of Appeals for the First Circuit

No. 2338. October term, 1928

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT, appellant

v.

HOOD RUBBER COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, MORRIS, and BREWSTER, JJ.

Opinion

Filed June 25, 1929

BINGHAM, J.: This is a suit brought by the Hood Rubber Company, appellee, in the Federal District Court for Massachusetts, to recover $39,043.99, the amount of an additional income and excess-profits tax for the year 1918, which was collected by distraint on December 15, 1926. By stipulation in writing the case was tried before the court without a jury.

The plaintiff, appellee, on March 14, 1919, filed its income and excess-profits tax return for the calendar year 1918, in which it estimated its tax at $300,000. This return was made on a form prescribed and furnished by the Treasury Department, known as "Form 1031–T" and designated as a "tentative return." At the time of filing this return the plaintiff paid one quarter ($75,000) of the
40 tax as shown by its return. And June 16, 1919, upon the demand of the collector, it paid as a second installment of the tax the further sum of $75,000. July 14, 1919, the plaintiff filed a completed, revised, or amended return showing its total tax for the calendar year 1918 to be $169,772.65, and on December 12, 1919, paid the balance of the tax, $19,772.65, as shown by this completed or amended return. January 26, 1924, while the revenue act of 1921 was in force, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement, authorized by section 250 (d) of the revenue act of 1921, extending the statutory period of limitation (five years) an additional period of one year in which to determine, assess, and collect the amount of income and excess-profits taxes due under any return made by the plaintiff for the year 1918 under the revenue act of 1921, or under prior income and excess-profits acts.

Thereafter the commissioner determined that an additional tax for the year 1918 was due, and on March 18, 1925, after the revenue

act of 1924 was enacted, assessed an additional tax against the plaintiff, which amounted to $39,043.99, after making certain deductions and allowance of credits. On December 15, 1926, a collection of this tax was had by distraint. A claim for refund was duly filed and rejected, and on January 12, 1928, this suit was brought.

In the District Court it was held that if the word "return" (as used in section 250 (d) of the act of 1921) meant the tentative return the Government did not assess the tax in time. But if it meant the return of July 14, 1919, the assessment was made within the required five years plus the additional year provided for in the waiver agreement. It said, however, that the question need not be decided, for if it be granted that the completed or amended return fixed the time from which to reckon, and the assessment was seasonably made, the tax was not collected either within five or within six years from the filing of the completed return; that the Government, having taken advantage of the six-year period for assessment, could not say that the six-year period for collection was changed by the subsequent act of 1924, which allowed six years after the
41 assessment for collection; that either the agreement of waiver conferred no power on the Government to make the assessment later than the statutory period allowed (five years), or the agreement applied to the time fixed for the collection as well the assessment; that it was to the advantage of both parties that the period of limitation should be extended—of advantage to the Government for the reason that, at the time the agreement of waiver was made, the statutory limitation of five years had nearly expired, and of advantage to the plaintiff to know when the tax would become unenforcible, so that it might properly arrange its financial affairs. And such being the case the agreement of waiver constituted a binding contract, which Congress did not intend to have affected by the provisions of the act of 1924. (C. & Nw. Ry. Co. v. United States, 104 U. S. 680.) Having reached this conclusion, the court entered judgment for the plaintiff in the sum of $39,043.99, with interest amounting to $4,568.15, and cost of suit. It is from this judgment that this appeal is taken.

For reasons that will later appear we do not find it necessary to consider whether the ground upon which the court below reached its conclusion was right or not.

The first question presented is whether the return filed March 14, 1919, is the one from which the five-year period of limitation (fixed by the revenue acts of 1918 and 1921), as extended by the waiver agreement of January 26, 1924, for one year, under the authority of the act of 1921, or whether the revised or amended return is the one from which the period of limitation is to be reckoned, for if the former is the one the additional tax of March 18, 1925, was not seasonably assessed.

There are apparently three cases in which this question has been under consideration in the Federal Courts: Florsheim Bros. Dry

Goods Co., Limited, v. United States (29 Fed. (2d) 895, 896 (5th Cir. Ct. of App.)), decided December 19, 1928; Rasmussen v. Brownfield-Canty Carpet Co. (31 Fed. (2d) 89, 91 (9th Cir. Ct. of App.)), decided February 11, 1929; and Brandon Corp. v. Jones, Collector, decided March 30, 1929 (Eastern Dist. of So. Car.).

In the first case no discussion of the question was had. All
42 that was said concerning the matter was: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return."

In the second case Judge Gilbert pointed out that the Board of Tax Appeals had entertained contrary views, and he took the position that the original or tentative return and not the completed or amended one fixed the date for the beginning of the running of the statutes of limitation as outlined in section 250 (d) of the act of 1921, but his associates refrained from expressing an opinion upon the question, as the distraint proceedings there in question were barred whether the period of limitation began to run from the filing of the tentative return or of the completed or amended one.

In the third case the facts and circumstances attending the filing of the so-called tentative return (Form 1031–T, prescribed by the Commissioner of Internal Revenue), were presented and considered, and it was held that the period of limitation began to run from the filing of the original or tentative return and not from the filing of the completed or amended return. It was there said:

"The revenue act for 1918, was enacted on Feb. 24, 1919. Under the act, returns were to be filed by March 15, 1919, and the tax paid in quarterly installments on March 15, June 15, Sept. 15, and Dec. 15, 1919. The law also provided that in case an extension of time for filing the return was granted the date for payment of the first installment should be correspondingly extended. [Section 250 (a).] It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the Government, however, were such that it was advisable that the first installment should be paid by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on Feb. 13, 1919, and the other on Feb. 27, 1919. In the first ruling it was stated that no general extension of time would be authorized, but that the commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of forty-
43 five days for the filing of the return, where the parties were unable to complete and file their returns by March 15. He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return the collector would accept the payment of the

estimated tax and agree to accept a revised and completed tax return within a period of not more than forty-five days. The ruling of Feb. 27, 1919, contains the following pertinent clauses:

"'Income-tax payers, both corporation and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.

"'A supply of blanks of Form 1040–T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of internal revenue to-day. Collectors will furnish this form to any individual requesting an extension of time for the filing of this complete return for 1918.

"'The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded to-morrow to each collector, who will mail these forms to every corporation on his list. (To be known as Form 1031–T.)

"'Under the estimated tax procedure, which is now available to every taxpayer under the income and excess-profits section of the new revenue law, there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

"'It is urged by the bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return, the excess payment will be automatically credited against the next installment, which will be due June 15.

"'The taxpayer will not be relieved, however, under this
44 plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.'

"Pursuant to these rulings the taxpayer on March 14, 1919, filed its tentative return on Form 1031–T, together with a statement of the estimated amount of the tax, accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate under the head of 'Penalties' it is stated that there is a penalty of $1,000.00 for failure to make return on time. On June 16, 1919, the completed return was filed."

After stating the respective contentions of the parties—that of the Government that the tentative return did not contain the information which the law required and amounted to nothing more than

an agreement for an extension of time, and that of the taxpayer that conceding that the tentative return did not contain all the information required by law, nevertheless it was a return for several purposes and must therefore be deemed a return from the filing of which the statute starts to run—the opinion continues:

"The tentative return certainly can not be construed to be merely an agreement for extension of time and to constitute no return in any aspect. The commissioner in his ruling of Feb. 13, 1919, called it a 'return' and in the ruling of Feb. 27, 1919, a 'tentative return.' In Form 1031–T itself it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear therefore that the filing of Form 1031–T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. (See sections 227 (a) and 241 (a) of the revenue act of 1918 (40 Stats. 1075–1082 and section 250 (a) of the same act (40 Stats. 1082).)

"It is common knowledge that the revenue act of 1918
45 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the Government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the Government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of Feb. 13, 1919, and Feb. 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

"But the tentative return was sufficient to constitute a return in another aspect. Sec. 250 (e) of the same act (40 Stats. 1083) provides that if any tax remains unpaid after it is due and for ten days after notice and demand there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax, but the same section provided that in the case of the first installment the instructions printed on the return should be deemed sufficient notice of the date when the tax is due and sufficient demand. Form 1031–T contained instructions complying therewith and was a sufficient notice and demand to make the first installment payable on March 15, 1919.

* * * * * * *

"Again Form 1031–T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

* * * * * * *

"The law clearly contemplates so far as the starting of the statute of limitation is concerned but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The Government can not blow hot and cold. It can not say to the taxpayer 'File a paper which we
46 know to be incomplete and does not give all the information required by law and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It can not say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary say that it is no return."

There are also decisions involving questions of like import where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. (Thomas v. United States, 22 Fed. (2d) 1000; United States v. Mabel Elevator Co., 17 Fed. (2d) 109.)

The original or tentative return filed in this case disclosed a tax of $300,000, based on the best information then available, a tax in fact much larger than was the tax actually due. It was made on the form and in the manner required by the commissioner and was the only return that could then have reasonably been made. It did not extend the time for payment of the tax disclosed, for the taxpayer was required to pay and did pay the first installment of $75,000 on the filing of the return, when under the law it was mandatory that payment of the first installment of the tax should be extended, if it was not the return required but the mere grant of an extension of time for filing a return. It was the return that put the tax statute into operation as respects the payment of the particular tax and caused the penalty feature of the law to become operative in case the taxpayer failed to pay at the appointed time. And the logical conclusion is that it was the return that also put the statutory period of limitation into operation, and we so hold.

The commissioner unquestionably had authority to inaugurate and require the tentative-return method of collecting the tax, and the presumption is that he did so in conformity with law. (Updike v.

United States, 8 Fed. (2d) 913; sections 1305 and 1309 of the
47 rev. act of 1918 (40 St. 1142–3); and sections 1300 and 1303 of the rev. act of 1921 (42 Sts. 308–9). As the time for assessing and collecting the additional tax expired March 14, 1925, before the tax was assessed or collected, the assessment and collection was unauthorized, and the judgment of the court below must be affirmed.

The judgment of the District Court is affirmed, with costs to appellee in this court.

[Certificate to foregoing paper omitted in printing.]

47A–48 [Minute entry of argument and submission, April 16, 1929, omitted in printing.]

In United States Circuit Court of Appeals

Judgment

June 25, 1929

This cause came on to be heard April 16, 1929, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof it is now, to wit, June 25, 1929, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed, with costs to the appellee in this court.

By the court:

ARTHUR I. CHARRON, *Clerk.*

[Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

Order allowing certiorari

Filed October 28, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34545. U. S. Circuit Court of Appeals, First Circuit. Term No. 414. Thomas W. White, collector of internal revenue, petitioner, vs. Hood Rubber Company. Petition for writ of certiorari and exhibit thereto. Filed September 23, 1929. File No. 34545.

U. S. GOVERNMENT PRINTING OFFICE: 1929